(33)

No. 89-1391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners do not complain that the government has failed to subsidize speech about abortion. *Contra* R.B. 11.[1] Rather, petitioners argue that the challenged regulations unconstitutionally condition Title X grants upon the surrender of First and Fifth Amendment rights.[2]

I. THE REGULATIONS VIOLATE THE FIRST AMENDMENT.

While there can be no doubt about the vitality of the unconstitutional conditions doctrine, *see, e.g.*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Secretary attempts to evade its strictures. He argues that Title X grants impose no restrictions on the speech of grant "recipients" but simply *define* as eligible for grants only those "projects" in which a designated "service"—here, counseling about abortion—is not provided. R.B. 21-22. Because, in the Secretary's view, the "grantee" that *runs* the "project" remains free to speak as it wishes, R.B. 12, 21-22, the regulations "do[ ] not infringe any constitutional right." R.B. 20.

But "[r]ewriting the argument to eliminate the play on words makes clear that there is nothing to it." *Nollan*, 483 U.S. at 838. The Secretary's proposed technique of redefining every conditioned grant or dispensation as a "specific subsidized service" free of constitutional constraint, R.B. 21, would enable virtually *any* condition on a subsidy to escape

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1 Petitioners herein refer to the Brief for the Respondent in Nos. 89-1391 and 89-1392 as "R.B. _____" and to the Brief for Petitioners in No. 89-1391 as "P.B. _____." *See generally* P.B. 1 n.1 (regarding citation form).

2 Since petitioners filed their initial brief with this Court, the Tenth Circuit Court of Appeals has joined the First Circuit Court of Appeals in holding the regulations unconstitutional. *Planned Parenthood Fed'n of Am. v. Sullivan*, No. 88-2251 (10th Cir. Sept. 6, 1990) (reprinted in Exh. A herein) ("*PPFA* at A-_____"); *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53 (1st Cir.) (*en banc*), *petition for cert. filed*, 58 U.S.L.W. 3824 (U.S. June 26, 1990) (No. 89-1929).

the scrutiny of this Court.[3] Indeed, governmental subsidies and waivers—including regulatory exemptions, permits, entitlements like Medicare, and grants for health, research, and education—could all be made the instruments of censorship in a marketplace dominated by government largesse.

The constitutional infirmity of the regulatory conditions the Secretary seeks to impose on Title X grantees cannot be obscured by such definitional legerdemain. His regulations must, therefore, be measured by traditional First Amendment standards.

A. Government May Not "Speak" by Distorting the Medical Information Provided by Health Professionals to Their Patients.

1. Distortion of the medical treatment dialogue cannot be defended by analogizing medical treatment to a TV documentary.

The Secretary's central refrain is that "the government is entitled to participate in public discourse," R.B. 22, by subsidizing specialized "projects" that espouse a particular "viewpoint." R.B. 23 n.21. In short, he argues that because the government may "act[ ] as a 'participant in the marketplace

3 In *FCC v. League of Women Voters*, for example, this Court forbade the government to condition its provision of funds on noncommercial television stations' agreement not to editorialize. Surely that case would not have come out differently had the government there insisted that its intention was only to fund "projects" that it defined as "editorial-free television stations"– projects that left the "grantee" free to exercise its right to editorialize elsewhere. So, too, in *Ragland*, where every member of this Court found that some constitutional restraint applied to conditions imposed on government subsidies and dispensations, *see* 481 U.S. at 229-30 (content discrimination); *id.* at 237 (Scalia, J., dissenting) (viewpoint discrimination), the government could not have evaded the Constitution's reach by defining its sales tax exemption as applicable only to "projects" to publish certain magazines that do not contain articles of "general interest" while leaving the "grantee" free to publish another magazine containing such articles unaided by the tax exemption.

Likewise, in *Nollan*, the state's conditioning of its building permit on the ceding of a beachfront easement surely could not have been saved by redefining the building permit as available only for "projects" to renovate beachfront homes that had ceded lateral easements.

of ideas' " by commissioning the production of a "television . . . documentary" made to government specifications, it follows that the government may subsidize clinical medical programs subject to the condition that their health professionals speak to patients according to these same specifications. *See* R.B. 22-23. But Title X clinics provide no mere docudrama, and their doctors and patients are unlike actors and those who watch them perform. It is precisely this difference that makes the regulations "an unacceptable means of conveying a message that [may] otherwise [be] legitimate." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring).[4]

Perhaps government can be said to have "spoken" by choosing to subsidize family planning information and services through Title X. But once it regulates the content of the speech it has funded, "complicated First Amendment issues are presented." *University of Pennsylvania v. EEOC*, 110 S. Ct. 577, 587 n.6 (1990). That complexity demands close scrutiny of the factual context in which the funded speech occurs.[5] Thus, the Secretary's claimed right to express his views by regulating a funded medical treatment dialogue must be assessed in light of such factors as the compatibility of

4 Indeed, all available means of enforcing these speech restrictions are themselves unacceptable. "[O]fficial scrutiny of the content of [speech] as the basis for [denial of a government subsidy] is entirely incompatible with the First Amendment[ ] . . . ." *Ragland*, 481 U.S. at 230. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988) (bureaucratic review is constitutionally suspect); *New York Times v. United States*, 403 U.S. 713, 714 (1971) (First Amendment condemns prior restraints).

5 This Court has always evaluated First Amendment claims in light of the context of the speech. Thus, comparable if not identical words can compel disparate constitutional results in different contexts. *See Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972); *cf. FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (emphasizing that "context is all-important"). For example, picketing focused on a particular residence may be prohibited even when more generally focused picketing cannot be, *Frisby v. Schultz*, 487 U.S. 474 (1988); in-person solicitation by an attorney may be prohibited whereas solicitation through an advertisement may not be, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); offensive programs may be prohibited on daytime radio, *Pacifica*, 438 U.S. at 748-50, but not on the telephone, *Sable Communications, Inc. v. FCC*, 109 S. Ct. 2829, 2839 (1989).

viewpoint bias with the history and function of the forum where the affected speech occurs;[6] the target audience's ability to "avert its eyes" or "turn the channel," R.B. 27;[7] and the harm to the target audience of viewpoint-based suppression of relevant information.[8] Such factors demonstrate that, whatever may be the government's power to control the speech it subsidizes, the First Amendment precludes viewpoint-based manipulation of the dialogue between funded health care professionals and their patients.

Title X, like Medicare, is an alternative source of funding for medical care. Unlike a government-commissioned television broadcast, the Title X program does not provide government speech at all. Rather, it provides government-supported medical services for low-income women who would not otherwise be able to obtain them. The provision of Title X family planning services is not "contract[ed] out," R.B. 22, to local public and not-for-profit health care agencies, 42 U.S.C § 300(a) at J.A. 3, so that they may perform a role in a government-scripted play. Instead, the employees of such agencies are expected to serve as "health care *professionals*," R.B. 25 (emphasis added), governed by existing ethical and legal norms. *See infra* nn.9 & 26. It is the function of these physicians and counselors, as of all health professionals, to give advice, information, and referrals to their patients

6 For example, in the context of government-subsidized education, this Court has considered the history of the "classroom [as] peculiarly the 'marketplace of ideas' " in assessing First Amendment claims. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

7 In assessing First Amendment claims, this Court has repeatedly considered whether a recipient of information "has [a] meaningful opportunity to avoid" the speaker's message. *Sable*, 109 S. Ct. at 2837. *See Pacifica*, 438 U.S. at 748-49; *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974).

8 Regulation of even funded speech that has the intent or "effect" of suppressing information or ideas violates the First Amendment. *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) ("*TWR*"). Censorship is particularly abhorrent when the information that the government seeks to suppress is necessary to prevent harm to the would-be recipient. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976).

according to their professional judgment and their patients' best interests.[9] No other manner of health care delivery is consistent with the fundamental premises of medical self-determination and patient choice.

In this context, the Secretary's effort to convert the Title X program into a vehicle for expressing the government's preference for childbirth over abortion is incompatible not only with the history and function of medical care, *see* ACOG *Amici* Brief at 4-6, 11; *see generally* P.B. 20-21, but also with the history and function of the First Amendment to assure the marketplace of information necessary for self-fulfillment and self-determination.[10] *See Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972); *see generally* T. Emerson, *The System of Free Expression* 6-7 (1970). Here, the Secretary seeks to "speak" by "contract[ing] the spectrum of available knowledge," *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), and by "choos[ing] the appropriate subjects for . . . dis-

9 The professional standards of the American Medical Association thus require doctors to provide full and unbiased information about and referral for all medical options, J.A. 79-81; *see also* J.A. 76-78; *infra* Point II, including those they are themselves unwilling or unable to provide, *see* 84a; Br. of *Amici Curiae* American College of Obstetricians & Gynecologists, *et al.* in Support of Petitioners ("ACOG *Amici* Brief") at 4-6. These standards reflect the reality that a disparity in medical knowledge and pressing personal circumstances often leave people seeking health care ill-equipped to recognize distortions and omissions in their physicians' advice and unable simply to "switch the channel." Indeed, for low-income family planning patients few other "channels" even exist. As the Tenth Circuit noted, "[I]t seems clear that government funding . . . fuels virtually all 'birth control' clinics in the nation . . . ." *PPFA* at A-16. NOTE: Congress appropriates between one and two *hundred million* dollars annually to support Title X programs, not "one to two million dollars" as stated in a typographical error in petitioners' brief. *See* P.B. 2.

10 Imagine, by analogy, a public defenders' office where lawyers are told they must counsel defendants that they would be better off confessing than resisting the state and where lawyers are forbidden to inform their clients of the right to remain silent and are forbidden to refer their clients to lawyers free to do so. A publicly-funded version of "L.A. Law" could be slanted toward such a view, but surely *real* lawyers, even those in a publicly-funded program of legal aid, *cf. Polk County v. Dodson*, 454 U.S. 312, 325 (1981) (holding that public defenders when performing lawyers' traditional functions are not state actors), could not be required to conform their professional judgments to such a government-approved viewpoint.

course," *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 515 (1981). Although the Secretary may, perhaps, "speak" his views by such means as informational pamphlets to be distributed in the waiting rooms of funded clinics, he may not do so by means of viewpoint-based censorship of the medical treatment dialogue in a manner at odds with patient health.

2. Health-endangering distortion of the medical treatment dialogue cannot be negated by disclaimers.

The Secretary argues that the dangers to women's health that these regulations would otherwise cause[11] can be neutralized by having every physician voluntarily issue a warning that the Title X program "provides only pre-pregnancy services, and [that] clients should go elsewhere if they desire *either* abortion-related counseling and services *or* obstetric care in carrying the child to term." R.B. 15 (emphasis in original). But even with the Secretary's proposed voluntary disclaimer, the regulations lay a "trap for the . . . unwary." *See* 61a (Cardamone, J., concurring).

First, a disclaimer of limited services at the clinic door will not lead women to "go elsewhere." R.B. 15. Both new and long-term patients come to Title X clinics because they don't know they're pregnant, and they do not always know in advance whether abortion information or referral will turn out to be medically indicated and immediately needed. For this reason, many women will be unable to assess, before entering the clinic, the relevance of the censored information to their personal medical circumstances. Thus, even if a disclaimer is prominently posted, women will be drawn into the clinic by its offer of free pregnancy tests, family planning counseling, and referral for all medical needs except abortion.

11 The unrefuted record on summary judgment establishes that Title X patients diagnosed as pregnant will face real medical risks as a result of the misleading information compelled by the regulations. Women will mistakenly conclude from their doctor's advice that childbirth is their only option, J.A. 154, 284-85; those women erroneously led to believe that continued pregnancy will not jeopardize their health will not obtain timely medical care, *e.g.*, J.A. 254-55; and for others, the delay prompted by the nonresponsive referral list will increase the risk of medical complications and even death from delayed abortion, J.A. 227, 192-95.

tion. *PPFA* at A-16. Title X patients will not simply abandon long-term clinic relationships, and women needing or desiring abortion information will not just "go away." *See id.*[12]

Second, once a woman has entered the clinic, the proposed disclaimer will not protect her from the deceptive medical advice she will receive there. Physicians and counselors will be required to "mislead" in a most literal sense; in short, "to lead [patients] in a wrong direction or into a mistaken action or belief." *Webster's Third New International Dictionary* 1444 (1986). Women are led "in the wrong direction" because, even with a disclaimer, *see* R.B. 15, health professionals must steer their patients out the door with a map on which nearly all roads leading to safe and legal abortion have been erased, and on which any road not erased has been left unmarked. Whether or not a disclaimer is given, patients will have no way to discover which, if any, provider on the mandatory referral list, *see* § 59.8(a)(2), may give them the complete counseling or abortion services they seek, *see* § 59.8(a)(3), except through a series of hit-or-miss visits or phone calls. *See* J.A. 154-55, 285-86.

Further, the disclaimer will not prevent a woman from being led into a "mistaken . . . belief" that an abortion would be ill-advised. If a woman does not ask about abortion, the regulations guarantee she will not be told about it. If she does ask, the doctor can only state that "the project does not consider abortion an appropriate method of family planning." § 59.8(b)(5). The doctor cannot explain the medical safety of the procedure, its legal availability, or its pressing importance to the patient's health.[13] Although the

12 The Secretary's "assumption of risk" theory that women who enter a Title X clinic, properly labeled, will have "elect[ed] to participate," R.B. 17, in its limited services is thus a fallacy. From the perspective of a woman who suspects she may be pregnant, the only thing she "elects" is the free pregnancy test she is offered.

13 Though the resulting delay in obtaining critical care may greatly increase a woman's medical risks, the Secretary argues that the delay is "volitional," R.B. 17 (discussing Fifth Amendment), and justified by his interest in disassociating Title X programs and the federal government from abortion-related speech, R.B. 17-18 n.13 (same). But once a woman is in the care of a Title X physician who gives her a misleading referral and tells her

Secretary suggests that the pregnant woman can just "go elsewhere" or "turn the channel," *see* R.B. 16-17, more likely she will ask herself: "Why does my doctor think abortion is 'inappropriate'? Because it is dangerous? Because it is dangerous for me? Because it is now illegal?" Indeed, because an abortion referral cannot be given even when medically indicated,[14] when a physician gives a patient with cancer, for example, referrals only to a cancer specialist and a prenatal care provider, *see* §§ 59.5(b)(1), 59.8(a)(1), the patient receives the false impression that her pregnancy does not actually threaten her health.[15]

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that abortion is inappropriate, the misinformation she receives becomes, at the very least, a contributing cause of the consequences that ensue. *See generally* Exh. B herein; ACOG *Amici* Brief at 24-29. Nor can the Secretary justify increases in medical risk by a governmental interest in disassociation. *First*, it is doubtful that such an abstract governmental interest would be weighty enough to justify the imposition of physical harm. *Cf. Carey*, 431 U.S. at 715 (Stevens, J., concurring). *Second*, less restrictive means of furthering this interest are available. For example, the Secretary could require all abortion referrals to be accompanied by the statement: "You should not interpret this referral as an indication that the federal government, which funds this clinic, sanctions your choice to obtain an abortion." *Third*, this Court has repeatedly held that an interest in disassociation cannot justify viewpoint discrimination. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 809-11 (1985); *Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981) (creation of forum does not imply "endorse[ment] . . . of the particular ideas aired there").

14 No abortion counseling or referral is permitted even when the pregnancy may exacerbate an underlying medical condition such as diabetes, sickle-cell anemia, cancer, AIDS, multiple sclerosis, epilepsy, myasthenia gravis, and certain cardiovascular disorders. *See* J.A. 254-55; *see also* Br. of *Amici Curiae* The American Public Health Association, *et al.* in Support of Petitioners at 9-10, 15; ACOG *Amici* Brief at 7-8. Suppose, for example, a woman who is HIV positive or has a severe cardiac abnormality obtains a confirmation of pregnancy at a Title X clinic and asks her Title X-funded physician or counselor: "If I do not have an abortion, will continued pregnancy jeopardize my health? Can I get a Medicaid-funded abortion? Where?" The answers to these questions are matters of fact, not advocacy. But because a truthful answer even to such factual questions will "assist" a woman in obtaining an abortion, *see* § 59.10, and constitute "counseling concerning" and "referral for" abortion, § 59.8, it violates the regulations. *See* Preamble to Final Regulations, 53 Fed. Reg. 2922, 2937 (1988) ("Pr., __").

15 Pregnancy may mask the extent of a cancer and actually accelerate the spread of tumors. *See generally* Williams & Bitran, *Cancer & Pregnancy*,

We all depend on our doctors. A pregnant woman going to a Title X clinic is no different. She, too, will depend on what her doctor is saying ("abortion is not appropriate") and take her Title X doctor's half-truths as reliable medical advice. Yet, a Title X health professional, who looks like a doctor and talks like a doctor, will not be free to *act* like a doctor—because the Secretary's regulations forbid him from providing full and accurate information about all lawful medical alternatives. Even with a disclaimer, patients will be induced to rely on the aura of trustworthiness that the image of the doctor projects.

Thus, not even the most detailed warning on the Title X "package" can neutralize the deception the regulations compel.[16] Medical care is not a product, and patients are not consumers in a world of *caveat emptor*. Because the Secretary's regulations require physicians to deceive by omission, they "place[ ] obstacles in the path of . . . [the] freedom" to receive reliable medical information. *TWR*, 461 U.S. at 549 (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

B. The Distortion of Medical Dialogue Mandated by the Regulations Cannot Be Disguised by Characterizing Them as Viewpoint Neutral.

Having at first conceded that his regulations "exhibit a bias in favor of childbirth and against abortion," Pr., 53

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12 Clin. Perinat. 609 (1985). *See also* ACOG *Amici* Brief at 7-8. A woman's health will be further threatened as any radiation treatment or chemotherapy, effective courses of treatment for cancer, may be circumscribed during pregnancy. *Id.* at 8.

16 Even to approximate full protection, the disclaimer would have to detail the full nature of the limitations. For example,

> I can tell you whether you are pregnant and I can tell you if you suffer from a serious medical condition, but unless the government considers your medical condition to be a life-threatening emergency, I cannot tell you whether or why you need to know about the effect of your medical condition on your pregnancy. Thus, I will not be able to give you any information about abortion, even if in my professional judgment your health will suffer. As a result, the information you will receive may not protect your health unless it is supplemented with information from other sources—sources that I am not free to name.

Fed. Reg. 2943, the Secretary now attempts to argue that the regulations need not be regarded as viewpoint discriminatory after all. In particular, he argues that, because Title X programs do not offer post-conception services, *e.g.*, R.B. 7, 35-36, the regulations "are content-based" in that they "prohibit all discussion of abortion 'pro or con.' " R.B. 23 n.21 (citing 59a). But the Secretary also concedes that whether his regulations are characterized as content or viewpoint based, "the [constitutional] analysis" in the instant case is "much the same." R.B. 23 n.21. Indeed it is.

When the government excises speech on a single, relevant topic from within a subject matter area it has decided to fund, its actions may be no less discriminatory than when it picks and chooses among opposing views.[17] It is the particular context in which the discrimination takes place that indicates whether, in that instance, it is invidiously viewpoint-based and thus antithetical to the First Amendment. While directing a clinic to confine its services to family planning and not to use Title X funds for a job counseling program, for example, would constitute a content-based implementation of an unproblematic notion of relevance—like telling a biology teacher to limit her class to the subject of biology—the Secretary's attempt to excise all nonpejorative information about abortion from the mandatory discussion of pregnancy and prenatal care *is* invidious viewpoint discrimination and *not* a relevance-based constraint of this nature.[18]

17 For example, when government funds a conference on energy policy but prohibits discussion of alternatives to nuclear power, or a conference on the political situation in the Middle East but bans discussion of Palestinian liberation, it tips the scales of free expression no less than if it prohibited only "anti-nuclear power" or "anti-Israel" speech. In such a context, censorship of a single topic of discussion may well constitute viewpoint discrimination.

18 Pregnancy and pregnancy options, such as abortion, are topics that are inextricably intertwined with the provision of comprehensive family planning services. P.B. 2-9. In this context, the Secretary cannot cite *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), for the proposition that his discriminatory excision of the topic of abortion is not

The Secretary says his regulations reflect a mere policy choice not to fund post-conception care or any speech about abortion, and not an invidious discrimination against any particular subject matter or view. R.B. 12, 23 n.21. But, in fact, the regulations do *not* require the Title X clinic simply to announce to every pregnant woman that she must leave because the clinic does not provide post-conception services. *See PPFA* at A-14. Rather, the regulations mandate that the Title X clinic provide *a certain kind* of information to the pregnant woman with regard to her pregnancy.

The regulations do *not* prohibit "all discussion of abortion." *Contra* R.B. 23 n.21. If a pregnant woman asks about abortion, she will be told that the clinic does not consider it an "appropriate method of family planning." § 59.8(b)(5). This *is* a "discussion of abortion," albeit conclusory and one-sided. At the same time, nothing in the regulations precludes speech *hostile* to abortion. *See*, *e.g.*, §§ 59.8, 59.10. Indeed, every example of prohibited speech in section 59.10(b) illustrates what the Secretary has condemned as abortion "advocacy." And, of course, the regulations specifically prohibit speech that "encourage[s], promote[s], or advocate[s] abortion." § 59.10(a).

Simultaneously, the clinic *must* provide the pregnant woman with a skewed "list of available providers that promote the welfare of mother and unborn child," § 59.8(a)(2), (a)(3), and with "information necessary to protect the health of mother and unborn child until such time as the referral appointment [for prenatal care] is kept." *Id.*[19] Indeed, the post-conception prenatal care information compelled by the

"invidious." Those decisions offer no support for a deceptive and discriminatory line between *information* about childbirth and *information* about abortion in government-subsidized medical counseling following a government-subsidized pregnancy test.

19 These and other post-conception services the Secretary continues to provide to pregnant women belie his assertion that pregnancy diagnosis ends the Title X project's role. R.B. 35-36. *See* Pr., 53 Fed. Reg. 2937 (prenatal care); Pr., 53 Fed. Reg. 2927 (social services); J.A. 75 (AIDS treatment referrals); Pr., 53 Fed. Reg. 2937 (other medical referrals).

regulations is itself not "neutral."[20] Most obviously, the repeated references to the welfare of the "mother"—a term defined to mean "a woman who has given birth," *Webster's Third New International Dictionary* 1474 (1986)—rather than the "woman," and to the "unborn child," rather than the "fetus," further highlight the viewpoint the regulations are intended to conceal.

A regulation is viewpoint neutral only when it " 'does not favor either side of a political controversy,' " *Boos v. Barry*, 485 U.S. 312, 319 (1988) (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980)), and does not "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). In this case, the Secretary not only favors one side of a politically-charged medical choice between childbirth and pregnancy termination, but admits the bias that the Constitution condemns. Pr., 53 Fed. Reg. 2943, 2944. That he has not chosen the even more extreme course of compelling anti-abortion advocacy is immaterial.[21]

C. Nor Can the Secretary Impose Substantial Burdens on Speech Supported by Non-Title X Funds Simply Because Grantees Remain "Free" to Decline Title X Grants Altogether.

The Secretary does not deny that the challenged regulations will restrict speech supported by non-Title X monies.

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20 The regulations do not, for example, evenhandedly maintain the status quo for undecided women. *Contra* R.B. 16 n.11. "Interim" care and information relevant to *women's* health are provided only for women who intend to carry to term. The regulations do not permit the Title X provider to offer a woman "interim" abortion information or a referral when an abortion may be medically indicated, P.B. 8-9, 34—or when she is "decided," but in favor of pregnancy termination.

21 *See Massachusetts v. HHS*, 899 F.2d at 73 (the regulations "slant the content of the relevant counseling in an 'antiabortion' direction"); *PPFA* at A-15 (regulations " 'facially discriminate on the basis of viewpoint and control the content of the [Title X] grantee's permitted speech' " (quoting and relying upon *New York v. Sullivan*, 889 F.2d 401, 416 (2d Cir. 1989) (Kearse, J., dissenting), *cert. granted*, 110 S. Ct. 2559 (1990))).

R.B. 29-32. Instead, he argues that conditions on "specific, federally subsidized project[s]," R.B. 30, that severely burden substantial private resources are permissible so long as grantees who "object[ ] . . . can simply decline the subsidy." *Id.* Notwithstanding the plain holding of *FCC*, 468 U.S. 364, the Secretary asserts a "take it or leave it" approach in defending the scope of his grant-making authority to restrict even speech he doesn't subsidize.

This Court has repeatedly rejected the proposition that government grants may be conditioned on relinquishment of a constitutional right because an individual or organization can decline the subsidy. The plaintiffs in *Frazee v. Illinois Department of Employment Security*, 109 S. Ct. 1514, 1516-18 (1989), *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958), and *Rankin v. McPherson*, 483 U.S. 378, 390-92 (1987), no less than petitioners in this case, could have "declined" government benefits, but this Court held that they should not be "forced to choose" between the exercise of their First Amendment rights and the receipt of government funds. *Frazee*, 109 S. Ct. at 1516 (citation omitted); *see also Nollan*, 483 U.S. at 836-42. Likewise, it was no answer to stations seeking conditioned Public Broadcasting Corporation grants that, if they disliked the conditions, they could simply choose not to accept the grants. *See FCC*, 468 U.S. at 400.[22]

Thus, the Secretary's argument that the ability simply to decline the subsidy renders all conditions constitutional cannot be squared with this Court's precedents; so, too, his claim that petitioners herein remain "free" to speak about abortion even if they choose to accept the Title X grant cannot be squared with the sweep of the regulations. First, the

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22 *South Dakota v. Dole*, 483 U.S. 203 (1987), is not to the contrary. *Dole* did not, as the Secretary suggests, R.B. 30-31, sanction the conditioning of federal funds upon compliance with *any* directive, merely because the state could decline the funds. Rather, this Court in *Dole*, although finding the Twenty-First Amendment not to be a bar, emphasized that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." 483 U.S. at 208 (citations omitted); *see id.* at 210 (noting that "a grant of federal funds conditioned on invidiously discriminatory state action" would be impermissible because government may not pay one to violate the rights of another).

requirement that petitioners contribute matching funds, patient fees, and third-party payments to the "Title X project," § 59.2, does not, in fact, leave grantees "free," as the Secretary implies. Indeed, the Secretary concedes that his prohibitions cover a substantial portion of the grantees' "private" resources and that "[t]here is no clear differentiation" between these monies, which cannot be used to set up a separate facility under § 59.9, and the Title X grant for purposes of the challenged regulations. R.B. 29-30 n.29.[23]

Second, the Secretary wholly ignores the severe burden on non-Title X dollars imposed by the distinct requirement that speech about abortion continue only in a facility that is *physically* separate from the entire Title X program, § 59.9,[24] and by the limitations on communication between even such physically separate affiliates, § 59.8(a)(3). *See* P.B. 24-31. The challenged regulations thus go well beyond the option of financial and corporate segregation within an existing facility that this Court has suggested could save an otherwise unconstitutional burden on privately funded speech. *TWR*, 461 U.S. at 544 n.6; *FCC*, 468 U.S. at 400. These regulations, unlike those the Court hypothesized in *FCC*, do not even permit the grantee to set up a separately funded affiliate "us[ing]" its existing physical "facilities." *See FCC*, 468 U.S. at 400. The burdens imposed on grantees here are, thus,

23 What the government does not disclose, in an effort to make palatable its restrictions on non-Title X funds and to distinguish the facts of *FCC*, 468 U.S. 364, is the significant amount of money the regulations encumber. For example, non-Title X funds account for more than 40% of the revenues of the Title X program at Columbia Presbyterian Hospital and over 50% of the revenues of the Title X program of Planned Parenthood of New York City. FY 1989 Grant Thornton Audit Report Medical and Health Research Association of New York (submitted to HHS, Region II). *See also Massachusetts v. HHS*, 899 F.2d at 55-56.

24 Contrary to the government's suggestion, R.B. 24 n.23, a facial challenge to § 59.9 is appropriate. Although the regulation permits a review of "facts and circumstances," it provides that a project "*must* be organized so that it is physically and financially separate" and that the factors relevant to a consideration whether the project is sufficiently separate *shall* include the "degree of separation from facilities . . . in which prohibited activities occur" and the "existence of separate personnel." § 59.9 (emphasis added).

too severe, *see* P.B. 27-31; *see, e.g.*, J.A. 156, 165-67, 275, to be permissible. *Cf. FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (plurality opinion) (finding separation requirement to be unduly burdensome on speech rights).

II. INDEPENDENT OF *ROE*, THE REGULATIONS VIOLATE THE FIFTH AMENDMENT.

Petitioners contend that the challenged regulations violate the Fifth Amendment because women entering Title X clinics who desire or need abortions are harmed by the medical misinformation they receive.[25] The Secretary as much as concedes that women will be misled and misinformed. *See generally supra* Point IA(2). The argument that this mandatory medical misinformation violates the Fifth Amendment, *see* P.B. 31-36, does not depend on *Roe v. Wade*, 410 U.S. 113 (1973), and thus does not present the issue of its continued validity, an issue raised by the Secretary. R.B. 13.

While the interest in making informed and voluntary choices is central to reproductive freedom, *see, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986), the liberty interests at issue in this case go well beyond the abortion choice. Title X patients, like other patients, have a liberty interest in being free from unwarranted governmental intrusion in the informed consent dialogue that is necessary to medical self-determination. *See*

25 Even the Secretary does not deny what every court to consider the regulations has found—namely, that the regulations "hamper or impede women in exercising their right of privacy in seeking abortions." *See* 55a; 61a (Cardamone, J., concurring). *See also Massachusetts v. HHS*, 899 F.2d at 69-70 (detailing obstacles to women's ability to choose an abortion created by the regulations); *PPFA* at A-12 to A-20 (same). Accordingly, even under this Court's decisions in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), the regulations unduly "encumber[ ] the woman's exercise of th[e] constitutionally protected right [whether or not to bear a child] by placing obstacles in the path of the doctor upon whom she [is] entitled to rely for advice in connection with her decision." *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977). *See* P.B. 31-36; *supra* Point IA(2).

Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2851-52 (1990); *id.* at 2856 (O'Connor, J., concurring). Little is more "deeply rooted in this nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion), than the right to free and open consultation between doctors and their patients on factual matters necessary to patient health. It does not seem too much to say that both the right of a patient to trust that her physician's advice is free of unwarranted governmental intrusion—and the right of a doctor not to be compelled to participate in "state-promulgated disinformation," *Thornburgh*, 476 U.S. at 800 (White, J., dissenting)—are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).[26]

These liberty interests have little or nothing to do with *Roe*; no member of this Court has suggested that, if *Roe* were overturned, states could not continue to permit abortion as an entirely lawful medical procedure. *Cf.*, *e.g.*, *Webster*, 109 S. Ct. at 3066 (Scalia, J., concurring). That doctors may not be paid by the government to suppress information concerning such a lawful medical option—and thereby to breach patient trust—is surely fundamental.[27]

III. THE SECRETARY HAS FAILED TO JUSTIFY READING TITLE X IN A MANNER THAT RAISES SERIOUS CONSTITUTIONAL CONCERNS.

The Secretary concedes that this Court should not uphold a construction of Title X that raises serious constitutional ques-

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26 Indeed, the common law duty to disclose material information in the context of a fiduciary relationship or "similar relation of trust and confidence," *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (citing Restatement (Second) of Torts § 551(2)(a) (1976)), has been applied historically to the doctor-patient context, *see* P.B. 20-21, and adopted by nearly every state as a basis for civil liability. *See, e.g.*, Exh. B to P.B.; Exh. B herein; *see generally Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

27 Since the rights recognized in *Roe* would in no event be dispositive, this Court should decline to revisit the constitutional underpinnings of those rights here. *Webster*, 109 S. Ct. at 3060-61 (O'Connor, J., concurring).

tions so long as an alternative construction exists that is "fairly possible." R.B. 32 n.35 (citation omitted). *See generally* P.B. 37-39. He argues, however, that no serious constitutional issues are raised, R.B. 32 n.35, and in any event that his interpretation of Title X to forbid abortion counseling and referral is permissible, R.B. 33, 39-40. *See generally Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-45 (1984). In thus persisting in his reliance on *Chevron*, the Secretary misses the point.

> Even if [his] construction of the Act were thought to be a permissible one, [it is] quite [certain] that in light of the traditional rule followed in *Catholic Bishop*, [this Court] must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [Title X].

Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 577 (1988).

The Secretary contends that a program that "characterizes abortion as a family planning option [by providing abortion counseling and referral] . . . has become a 'program[ ] where abortion is a method of family planning' " for purposes of section 1008 of the Act. R.B. 34. To make sense of this reading, the Secretary rewrites the statutory language in two ways. First, he reads the section to prohibit the funding of programs that "characterize[ ]," R.B. 34, or "treat[ ] abortion as a method of family planning," R.B. 34 n.38, while disregarding the statutory language itself, which prohibits funding only to "programs where abortion *is* a method of family planning." 42 U.S.C. § 300a-6 at J.A. 10. Second, the Secretary ignores Congress' explicit decision to fund a "broad range of . . . family planning . . . services," as well as "methods." 42 U.S.C. § 300(a) at J.A. 3. Instead, he reads section 1008 to deny funds to programs that provide a *service* that "treats" abortion as a family planning option, R.B. 34 n.38, rather than to exclude only programs that provide "abortion as a *method* of family planning." 42 U.S.C. § 300a-6 (emphasis added) at J.A. 10. But counseling and referral are not themselves *methods* of family planning. *See generally* P.B. 41-42.

In an effort to demonstrate that his strained reading of the statute is the only one that is "fairly possible," the Secretary points to a reference in the Conference Report to "preventive family planning services." *See* R.B. 35-36; *but see supra* Point IB. But the Secretary's suggestion that Congress intended information about options for coping with unwanted pregnancy to be neatly excised from all conversation between a doctor or counselor and a Title X patient seeking family planning information approaches the absurd. The specter of unwanted pregnancy is virtually the *raison d'etre* of a family planning clinic, "preventive" or otherwise. In this light, it is implausible that Congress did not view the provision of such information as an "informational . . . activit[y]" "related" to preventive family planning.[28]

Conceding that "the meaning of Section 1008 is less than completely clear," R.B. 40 n.45, the Secretary nevertheless argues that his construction of Title X must be upheld because it is permissible. R.B. 39-42.[29] But the General Accounting Office ("GAO") Report on which he relies is at best a "slim reed" of support, *Massachusetts v. HHS*, 899 F.2d at 63, for abandonment of the prior agency interpretation of Title X that expressly permitted nondirective abortion counseling and referral. *See generally* Exhibit C to P.B.

28 *See* H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5081-82 ("*Conf. Rep.*") at 70a, *cited in* R.B. 6, 35-36. The Secretary further points to the statements of Congressman Dingell to the effect that Title X programs should not "encourage[ ] or promote[ ]" abortion. R.B. 36 (discussing statements at 116 Cong. Rec. 37375 (1970)). Even if the statements of one Congressman were sufficient authority for an interpretation of section 1008, *but see Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), the statements relied upon by the Secretary in no way require or authorize regulations that clearly and deliberately proscribe even neutral, truthful, and factual information about abortion as an option for unwanted or medically contraindicated pregnancy. In any event, Congressman Dingell has disavowed the intent the Secretary ascribes to his words. J.A. 137-39.

29 Two courts of appeals have agreed that § 1008 is at best ambiguous, *PPFA* at A-9; *Massachusetts v. HHS*, 899 F.2d at 64, and have held that whether the regulations are a permissible construction of the statute is, at the very least, a "close question," *PPFA* at A-10; *Massachusetts v. HHS*, 899 F.2d at 64.

(detailing administration interpretation).[30] Indeed, the GAO, finding "no evidence that title X funds had been used for abortions or to advise clients to have abortions," *e.g.*, J.A. 84, actually recommended *not* that HHS abandon its longstanding interpretation, but that it codify its "position on the scope of . . . Section 1008" into regulations to insure that the policy would be adequately "communicated to all title X recipients." J.A. 88, 107, 121. Given the unprecedented dilemma the challenged regulations impose upon physicians, *see* ACOG *Amici* Brief at 11 (choice between civil liability, disciplinary consequences, and patient health on one hand and jeopardizing clinic survival on the other),[31] and the serious constitutional issues engendered by the Secretary's interpretation, the GAO Report should not sway this Court

30 The Secretary must concede that his present interpretation of agency policy reflects an abrupt reversal of prior, long-held agency opinion that the provision of neutral information and "mere" referral did not constitute promoting and encouraging abortion and were, therefore, permitted in Title X programs. *See* P.B. 47-48; Exh. C to P.B.; *see also* Appellant's Supplemental Brief at 24-25, *Massachusetts v. HHS*, 899 F.2d 53 (1st Cir. 1990) (*en banc*) (No. 88-1279) (noting that the agency had long read § 1008 "to limit a grantee's activities only if abortion were presented as a *preferred* method—*i.e.*, an encouraged or advocated method—of family planning") (emphasis in original).

31 To the argument that the regulations will require doctors to risk civil liability, *see* Exh. B to P.B.; Exh. B herein, the Secretary has offered only the flippant response that the Supremacy Clause permits him to supercede state tort law. *See* Pr., 53 Fed. Reg. 2933. However, an area of law " 'traditionally occupied by the states' " cannot be preempted absent a " 'clear and manifest' " expression of intent by Congress, *see English v. General Elec.*, 110 S. Ct. 2270, 2275 (1990) (citations omitted), not present in this case. *See Conf. Rep.* at 8-9 (Title X not intended to interfere with program run in accord with state law) at 70a; *see also Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) ("presumption" against preemption on matters of "health"). Basic principles of federalism preclude an interpretation of Title X that runs roughshod over state law and requires state agencies to implement a federal campaign. *See generally Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643-45 (1986). Indeed, 13 state Attorneys General plus the District of Columbia Corporate Counsel have filed an *amicus* in support of petitioners herein, *see* Br. of Celebrezze, Attorney General of Ohio, *et al. Amici Curiae* in Support of Petitioners, and 36 state health departments filed comments with HHS opposing the regulations. 141A.

from the alternative construction that may "fairly be ascribed to [Title X]"—one the agency had itself adopted for 17 years. *See DeBartolo*, 485 U.S. at 577; *see generally* Exh. C to P.B.

CONCLUSION

Petitioners respectfully ask this Court to reverse the judgment of the Second Circuit Court of Appeals and to invalidate the challenged regulations codified at 42 C.F.R. §§ 59.2, 59.8, 59.9, 59.10.

Dated: October 9, 1990

Respectfully submitted,

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EXHIBITS

EXHIBIT A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-2251

PLANNED PARENTHOOD FEDERATION OF AMERICA, PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, PLANNED PARENTHOOD ASSOCIATION OF UTAH, BOULDER VALLEY WOMEN'S HEALTH CENTER, MARILYN FOELSKI, M.D., PHILIP FREEDMAN, M.D., and KIRTLY JONES, M.D.,

Plaintiffs-Appellees,

—v.—

LOUIS SULLIVAN, M.D., individually and in his capacity as Secretary of the United States Department of Health and Human Services,

Defendant-Appellant.

Appeal from the United States District Court for the District of Colorado (D.C. Civil No. 88-z-158)

Alfred Mollin, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., (John R. Bolton, Assistant Attorney General; Michael J. Norton, United States Attorney; and John F. Cordes, Attorney, Department of Justice, Washington, D.C.; Of Counsel: Joel Mangel, Deputy Chief Counsel, Public Health Service; and Carol Conrad, Attorney, Office of the General Counsel, Department of Health and Human Services, with him on the briefs), for Defendant-Appellant.

Roger K. Evans (Dara Klassel and Beth Otten, also of Planned Parenthood Federation of America, Inc., New York, New York; Edwin S. Kahn and James W. Hubbell of Kelly/Haglund/Garnsey and Kahn, Denver, Colorado, with him on the brief) for Plaintiffs-Appellees.

Kent Masterson Brown, Lexington, Kentucky; Charles Onofrio, Denver, Colorado; and Clarke D. Forsythe, Americans United for Life Legal Defense Fund, Chicago, Illinois, filed an amici curiae brief on behalf of American Academy of Medical Ethics, Association of American Physicians & Surgeons, American Association of Pro Life Obstetricians & Gynecologists, American Association of Pro-Life Pediatricians, National Doctors for Life, Christian Medical Society, Christian Medical Foundation, Alabama Physicians for Life, Physicians for Moral Responsibility, National Association of Pro-Life Nurses, California Pro-Life Nurses Association, Georgia Nurses for Life, Indiana Nurses Concerned for Life, Missouri Nurses for Life, New York State Nurses for Life, Inc., Pennsylvania Nurses for Life, Rhode Island Nurses for Life, Washington Pro-Life Nurses Association, Southern Center for Law and Ethics, and Certain Fellows and Members of the American College of Obstetricians and Gynecologists and of the American Medical Association in support of Defendant-Appellant.

Paul Lewis, Denver, Colorado; James Bopp, Jr. and Richard E. Coleson of Brames, McCormick, Bopp & Abel, Terre Haute, Indiana, filed an amici curiae brief on behalf of Senator Gordon J. Humphrey and Congressmen Thomas J. Tauke, Thomas A. Luken, Thomas J. Bliley, Dan Coats, Christopher H. Smith, Henry J. Hyde, Alan B. Mollohan, and Vin Weber in support of Defendant-Appellant.

John H. Hall and Mary Sue Henifin of Debevoise & Plimpton, New York, New York; Of Counsel: Nadine Taub, Rutgers University School of Law, Newark, New Jersey; and Sarah E. Burns, Legal Director, NOW Legal Defense and Education Fund, New York, New York, filed an amici curiae brief on behalf of NOW Legal Defense and Education Fund,

National Abortion Rights Action League, American Association of University Women, Black Women's Agenda, Catholics for a Free Choice, Center for Population Options, Colorado Women's Bar Association, National Abortion Federation, National Council of Jewish Women, National Emergency Civil Liberties Committee, National Organization for Women, National Women's Conference Committee, National Women's Health Network, National Women's Political Caucus, Public Citizen Health Research Group, United Church of Christ, Women's Equity Action League, Women's Law Project, Young Women's Christian Association of Boulder County, Young Women's Christian Association of Metropolitan Denver, and Young Women's Christian Association of U.S.A. in support of Plaintiffs-Appellees.

Jack R. Bierig, David F. Graham, Lynn D. Fleisher and Richard D. Raskin, Sidley & Austin, Chicago, Illinois; Of Counsel: Kirk B. Johnson and Edward B. Hirshfeld, American Medical Association, Chicago, Illinois; Ann E. Allen, American College of Obstetricians and Gynecologists, Washington, D.C., filed an amici curiae brief on behalf of the American Medical Association, American College of Obstetricians and Gynecologists, and American Society of Human Genetics in support of Plaintiffs-Appellees.

Bruce S. Wolff, Charles S. Sims, Suzette Brooks and William S. Koenig of Proskauer, Rose, Goetz & Mendelsohn, New York, New York, filed an amici curiae brief on behalf of The American Public Health Association, The Association of State and Territorial Health Officers, The Association of Schools for Public Health, The American College of Physicians, The American Medical Student Association, The Association of Reproductive Health Professionals, The California Coalition of Nurse Practitioners, The Colorado Academy of Family Physicians, The Colorado Department of Health, Colorado Physicians for Choice, Colorado/Wyoming Chapter of the American College of Nurse Midwives, The Intermountain Medical Society, The Maryland Department of Health and Mental Hygiene, The National Association of Nurse Practitioners in Family Planning, The National Urban

League, The Nurses Association of the American College of Obstetricians and Gynecologists, The Ohio Department of Health, The South Dakota State Department of Health, The Wisconsin Nurse Practitioners in Reproductive Health, and Dr. Allan Rosenfield, Dean of the Columbia University School of Public Health in support of Plaintiffs-Appellees.

Cynthia P. Delaney, Leanne B. DeVos, Karen H. DuWaldt, Diana Terry Reindl, and Kathleen Yurchak, American Civil Liberties Union Foundation of Colorado, Denver, Colorado, filed an amicus curiae brief on behalf of American Civil Liberties Union in support of Plaintiffs-Appellees.

David M. Becker and Virginia A.S. Kling of Wilmer, Cutler & Pickering, Washington, D.C., filed an amici curiae brief on behalf of Representative Bill Green, Senators Barbara A. Mikulski, Lowell P. Weicker, Jr., Brock Adams, John H. Chafee, Alan Cranston, Howard M. Metzenbaum, Paul Simon, Robert T. Stafford, William S. Cohen, Daniel J. Evans, Bob Packwood, and Timothy E. Wirth, and Representatives Daniel K. Akaka, Les AuCoin, Julian C. Dixon, Vic Fazio, William H. Gray III, Steny H. Hoyer, William Lehman, Robert J. Mrazek, John Edward Porter, Martin Olav Sabo, Henry A. Waxman, Jim Bates, Rick Boucher, Cardiss Collins, Mickey Leland, James H. Scheuer, Ron Wyden, Gary L. Ackerman, Chester G. Atkins, Anthony C. Beilenson, Howard L. Berman, Sherwood L. Boehlert, Don Bonker, Barbara Boxer, George E. Brown, Jr., Albert G. Bustamante, Benjamin L. Cardin, Thomas R. Carper, George W. Crockett, Jr., Peter A. DeFazio, Ronald F. Dellums, Mervyn M. Dymally, Don Edwards, Lane Evans, Dante B. Fascell, Walter E. Fauntroy, Barney Frank, Bill Frenzel, Robert Garcia, Sam Gejdenson, Benjamin A. Gilman, Charles A. Hayes, James M. Jeffords, Nancy L. Johnson, Robert W. Kastenmeier, Joseph P. Kennedy II, Peter H. Kostmayer, Richard H. Lehman, Sander M. Levin, Mel Levine, John Lewis, Mike Lowry, Matthew G. Martinez, Robert T. Matsui, George Miller, John R. Miller, Jim Moody, Constance A. Morella, Bruce A. Morrison, Stephen L. Neal, Nancy Pelosi, Claude Pepper, Charles B. Rangel,

Marge Roukema, Claudine Schneider, Patricia Schroeder, Christopher Shays, David E. Skaggs, Louise M. Slaughter, Lawrence J. Smith, Olympia J. Snowe, Stephen J. Solarz, Pete Stark, Gerry E. Studds, Edolphus Towns, Morris K. Udall, Ted Weiss, Alan Wheat, and Howard Wolpe in support of Plaintiffs-Appellees.

Before

LOGAN, MOORE and BALDOCK, Circuit Judges.

LOGAN, Circuit Judge.

This appeal arises out of an action brought by organizations and physicians receiving funds under Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-6, who challenge, on behalf of themselves and their patients, the 1988 amendments to the regulations under which Title X funds are administered. *See* 53 Fed. Reg. 2922, 2943-46 (1988) *codified at* 42 C.F.R. §§ 59.2, 59.5, 59.7-59.10. The new regulations prohibit Title X participants from advising women about abortion as a medical option if birth control devices should fail or if they are already pregnant, and the regulations require physical, financial, and personnel separation of Title X supported facilities from any others that counsel about or perform abortions.

The district court entered a preliminary and then a permanent injunction against implementation of the new regulations. *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (preliminary injunction) and 687 F. Supp. 540 (permanent injunction) (D. Colo. 1988). The district court ruled that the regulations violate the intent of Congress as expressed in the statute, informed by its contemporaneous and subsequent legislative history. 680 F. Supp. at 1468-73; 687 F. Supp. at 542. It also held that the regulations violate the constitutional rights of the women patients and their advising physicians. 680 F. Supp. at 1473-78; 687 F. Supp. at

542-44. On appeal the Secretary of Health and Human Services challenges all of these rulings.

Two other federal courts of appeals have faced the precise issues before us. A divided panel of the Second Circuit upheld the 1988 regulations against both statutory and constitutional challenges, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), *cert. granted*, 58 U.S.L.W. 3753 (U.S. May 21, 1990) (Nos. 89-1391, 89-1392). The First Circuit, en banc with one dissent, struck down the new regulations in their entirety, principally on constitutional grounds. *Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53 (1st Cir. 1990) (en banc). That court concluded that of the 1988 amendments, only 42 C.F.R. § 59.9 was invalid as inconsistent with Congress' intent as expressed in Title X or on other nonconstitutional grounds. But the court held that all of the amendments violated the constitutional rights of women to make informed decisions concerning abortion, and violated the consulting physicians' First Amendment rights to properly advise their patients.

We find ourselves in agreement with the First Circuit's analysis, and we join it in holding the regulations invalid.

I

Congress enacted Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-6, in 1970. The act authorizes the Secretary of Health and Human Services "to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." *Id.* § 300(a). Section 1008 of that act provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6. Grants and contracts under Title X are to be made "in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4.

Title X funds have never been permitted to be used either to perform or to subsidize actual abortions. *See* 42 C.F.R. §§ 59.5(a)(5), 59.9 (1986). Almost since its enactment, however, the administrative interpretations permitted, and, since 1981, required Title X projects to provide nondirective counseling and referrals to pregnant women about all legally available medical options, including abortion. 53 Fed. Reg. 2923 (1988). This policy was reversed abruptly in 1988 by the promulgation of the regulations now under attack.

In the new regulations, § 59.2 redefined the term "family planning" to refer solely to preconceptual services, explicitly excluding pregnancy care and abortion. Sections 59.7 and following were rewritten entirely. Section 59.8(a)(1) expressly prohibits Title X projects from providing counseling concerning abortion or referrals for abortion. Section 59.8(a)(2) states that once a Title X project client is diagnosed as pregnant she "must be referred for appropriate prenatal and/or social services" by giving her a list of providers that promote welfare of mothers and unborn children, and she "must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." She may be referred for emergency care. But § 59(a)(3) says that the project may not use emergency referrals as an "indirect means of encouraging or promoting abortion" by weighing referrals in favor of providers that perform abortions, by including on the list of referrals any providers whose principal business is providing abortions, by excluding providers who do not perform abortions, or by "steering" women to providers who offer abortions. Subsection (4) states that the project can provide the woman with medical information necessary to assess the risks of different methods of contraception, but cannot include counseling with respect to abortion.

Examples of proper and improper actions by Title X providers are set out in § 59.8(b). A pregnant woman requesting prenatal care must be referred to appropriate providers of prenatal care services. *Id.* § 59.8(b)(1). But a pregnant woman who asks for a list of abortion providers may not be given a list that includes any clinic which "principally" pro-

vides abortion, or a list that includes hospitals and clinics which provide abortion in addition to prenatal care, unless providers of prenatal care in the area that do not provide or refer for abortions are also included on the list. *Id.* § 59.8(b)(3) & (4). The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request, and apparently must tell one making such an inquiry that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.* § 59.8(b)(5).

Section 59.9 states specifically that Title X projects have to be so organized that they are "physically and financially separate" from prohibited abortion activities. This requires that the Title X project must have an "objective integrity and independence from prohibited activities;" mere bookkeeping separation is not sufficient. *Id.* The objective integrity and independence is based on factors that include, but are not limited to, separate accounting records, separate facilities, separate personnel, and absence of material promoting abortion. *Id.*

Section 59.10(a) prohibits "actions to assist women to obtain abortions or increase the availability or accessibility of abortion." Specific examples of prohibited activities include lobbying for legislation increasing the availability of abortions, giving patients brochures advertising an abortion clinic, or making an appointment for a pregnant woman with an abortion clinic.

II

Although the Secretary admits that the 1988 regulations are a result of a shift in political climate and represent a significant departure from the policy of the first seventeen years of Title X grants, see *New York*, 889 F.2d at 418 (Kearse, J., dissenting), he defends the regulations as more consistent with the proper interpretation of Title X than the earlier practice. Thus, we determine first whether the 1988 changes

in the regulations are permissible under the statute, apart from their constitutionality.

The words of the statute are paramount, of course, and we must give effect to the "unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Each of the circuit courts that have considered the question have found the language of § 1008 of the Act, 42 U.S.C. § 300a-6, that no funds appropriated "shall be used in programs where abortion is a method of family planning," is not free from ambiguity. These courts then appropriately considered the contemporaneous and subsequent legislative history and past administrative interpretations of the section. *See Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108-120 (1980). They found the contemporaneous legislative history ambiguous for the most part, although the First Circuit relied upon it to invalidate the new 42 C.F.R. § 59.9, requiring separation of facilities. *See Massachusetts*, 899 F.2d at 59-60. These decisions also considered the subsequent legislative history in the context of the long-standing administrative construction. In the end, however, both circuits, except for *Massachusetts'* ruling on § 59.9, held that the changes in the regulations were not beyond the power of the Secretary under the statute.

We agree that the language of 42 U.S.C. § 300a-6 is ambiguous in that it does not resolve the issues presented in the challenged regulations. Moreover, the contemporaneous legislative history does not address whether clinics receiving Title X funds can engage in nondirective counseling including the abortion option and referrals, upon patient request. While there has been some recent erosion of the federal courts' practice of consulting "longstanding and consistent" agency interpretations and some of the other techniques for parsing legislative history that we have used to ascertain whether a statute commands a particular result, the Supreme Court decisions have continued to rely on the "traditional tools of statutory construction" in determining congressional intent on "the precise question at issue," *Chevron*, 467 U.S. at 843 n.9; *See NLRB v. United Food & Commercial Work-*

ers, 484 U.S. 112, 123 (1987); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 (1987). We have considered all of those traditional tools, but do not discuss them in any detail because we can add little to the *Massachusetts* court's analysis of the statute and the relevant interpretative history.

Like the *Massachusetts* court, we find that the propriety of the regulatory changes is a close question—largely because of many years of consistent administrative interpretation, with six reenactments of parts of Title X, and numerous reappropriations, during which unsuccessful attempts were made at statutory amendment to change the practice of counseling and referrals for abortion on this highly visible and controversial matter. *See Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983) (agency interpretation of statute confirmed or ratified by subsequent congressional failure to change it). In the end, however, we agree with the *Massachusetts* court that, except for new 42 C.F.R. § 59.9, the amendments are not statutorily impermissible.

Title X clearly directs the Secretary to administer a grant program to promote family planning under a statute that delegates to him some discretion with an admonition not to fund abortions. Supreme Court decisions have held that when the mandate of Congress is ambiguous we must defer to any reasonable interpretation by the agency. *See, e.g., NLRB v. Curtin Matheson Scientific, Inc.*, 58 U.S.L.W. 4407, 4411 (U.S. Apr. 17, 1990) (No. 88-1685); *United Food & Commercial Workers Union*, 484 U.S. at 123; *Chevron*, 467 U.S. at 844. This rule applies even when the agency is changing a prior interpretation. *E.g., Curtin Matheson*, 58 U.S.L.W. at 4411; *Chevron*, 467 U.S. at 864-64; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *American Trucking Ass'ns, Inc. v. Atchison, Topeka & S.F. Ry Co.*, 387 U.S. 397, 416 (1967). That the interpretation is long-standing is not significant unless we can comfortably conclude that a majority of Congress intended the prior interpretation to be frozen into law, a conclusion we cannot reach here. *See Motor Vehicle Mfrs.*, 463 U.S. at 45.

The Secretary must justify his change of interpretation with "a reasoned analysis," *Motor Vehicle Mfrs.*, 463 U.S. at 42, 57. In a lengthy discussion in the Federal Register, the Secretary argued that the new regulations are more in keeping with the original intent of the statute, justified by client experience under the prior policy, supported by a shift in attitude against "elimination of unborn children by abortion," 53 Fed. Reg. at 2944, and consistent with a change in policies by a new political administration. Whether or not we personally would approve of these changes, the agency has sufficiently justified them and we therefore cannot rule them to be arbitrary and capricious. *See Chevron*, 467 U.S. at 865.

The one exception is 42 C.F.R. § 59.9, which requires an amount of physical, financial, and personnel separation between Title X funded activities and any counseling mentioning abortion that would seem to put out of business many current grantees. All of the Title X grantees must provide at least ten percent nonfederal "matching funds," 42 U.S.C. § 300a-4(a). Most provide significantly more than that; federal funds apparently account for only about fifty percent of the money received by Title X grantees. *Massachusetts*, 899 F.2d at 56. One of the plaintiffs in the case before us is a physician in private practice who handles Title X patients in his office, I R. tab 1 ¶ 10; that doctor performs abortions for private, paying patients, *id.* tab 2, Decl. Sylvia Clark. The new § 59.9 clearly prohibits continued Title X funding to that doctor, despite the fact that he is not providing abortion services for Title X patients. Quite apart from the constitutional problems, we agree with the *Massachusetts*, court, 899 F.2d at 59-60, and the district court below, 680 F. Supp. at 1468-69, that the new § 59.9 has the effect of restricting the number of permissible grantees beyond the intent of Congress as expressed in 42 U.S.C. §§ 300, 300a and Title X as a whole. Although it was not enacted as a part of Title X, 42 U.S.C. § 300a-7 lends support to our holding. This provision had its origin as a measure to prevent discrimination against those who will not perform abortions, but clearly states a general nondiscrimination policy applicable to all grants under the Public Health Service Act, of which Title

X is a part. That section requires that no personnel decisions be made on the basis of either "reluctance or willingness" to counsel or perform abortions. *Id.* § 300a-7(d). When the anti-discriminatory provisions are considered along with the statements in Title X of an intent to provide a "broad range" of services, 42 U.S.C. § 300(a), taking into account the extent "services are needed locally," *id.* § 300(b), that "priority will be given . . . to furnishing such services to persons from low-income families," *id.* § 300a-4(c)(1), with suitable "informational or educational materials" made available to the targeted population, *id.* § 300a-4(d)(1), we believe it violates congressional intent to deny the issuance of Title X grants solely because the grantee is not sufficiently funded to meet the separation requirements of 42 C.F.R. § 59.9.

III

We turn now to the constitutional issues raised by plaintiffs and passed upon by the district court. The important threshold question is whether the instant situation in controlled by the line of cases commencing with *Maher v. Roe*, 432 U.S. 464 (1977), which held that a government constitutionally may encourage childbirth over abortion by funding only prenatal and childbirth expenses. The Court found that the carrot of state aid, which might induce an indigent woman to carry to term rather than abort, was not the equivalent of a state-created obstacle in the woman's path to an abortion. *Id.* at 474, 477 n.10.

In *Harris v. McRae*, 448 U.S. 297 (1980), the Court held that the United States government's refusal to fund an indigent woman's medically necessary abortion, when it would pay the costs of her bearing the child, did not violate her constitutional rights. The Court reasoned that her freedom of choice does not carry with it a constitutional entitlement to the money necessary to avail herself of the full range of protected choices; "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Id.*

at 316. A year ago, the Supreme Court upheld, on the same reasoning, the right of a state to prohibit the use of state funds or state facilities to perform abortions; "Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all. The challenged provisions only restrict a woman's ability to obtain an abortion to the extent she chooses to use a physician affiliated with a public hospital." *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 (1989).

Although the instant case bears superficial resemblance to the *Maher* line of decisions—a governmental choice to use its funds to promote childbirth over abortion—there are significant differences which we believe make those cases inapposite. The government, of course, has not gone so far as to socialize medicine and publicly fund all hospitals and physicians, a situation the *Webster* decision said might require a different analysis. 109 S. Ct. at 3052 n.8.[1] But it has set up a funding system by which approximately 4,000 entities, including state governments, have been induced to become Title X grantees by offers of up to ninety percent federal funding. The Secretary has admitted that the projects serve approximately 1,000,000 adolescent women. 53 Fed. Reg. at 2944. The total number of women served is no doubt much greater.

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1 *Webster* also expressed reservation regarding the constitutionality of a state's denying use of public facilities to doctors who perform abortions for private patients at private facilities. 109 S. Ct. at 3052 n.8. Such a situation is analogous to the regulations before us now, because the regulations deny public funding to grantees who perform or counsel concerning abortions, even for private, non-publicly funded patients. *See* 53 Fed. Reg. 2922 ("[S]ection 1008 [42 U.S.C. §300a-6)] extends to all activities conducted by the federally funded project, not just the use of federal funds for abortions within the project."); 53 Fed. Reg. 2927 ("The Department's concern is that all funds allocated to the Title X program or project—whether they are direct Title X grant funds, program or grant-related income, or matching [private] fund [sic]—be spent in compliance with Section 1008 and that the program be separate and distinct from prohibited abortion activities.").

> "It has been said that Title X, as the single largest federally-funded family planning program, serves 4.3 million people: its targeted population consists of an estimated 14.5 million women at risk of unintended pregnancy, including 5 million adolescents between the ages of 15 and 19, and 9.5 million adult women between the ages of 20 and 44, all of whom have an income 150 percent below the poverty level."

New York, 889 F.2d at 415 n.1.

The record establishes that many women who visit these Title X providers do so because they suspect they are pregnant; the clinic provides pregnancy testing, and many are indeed found to be pregnant. Had the regulations directed that once pregnancy is established the clinic must say, "Go away, we only give advice on prepregnancy planning," then it might be said the government has done no more than subsidize a permissible activity. The regulations, however, require the clinic to go one step further in its treatment of the patient. When a patient is diagnosed as pregnant she *must* be provided with both referrals to prenatal service providers and with interim information on prenatal care. 42 C.F.R. § 59.8(a)(2). Even if the patient specifically requests information on abortion, the clinic is not permitted to advise her about it. We can summarize this no better than did Judge Kearse in her dissent in *New York*:

> "There can be no doubt that the Secretary intends this regulation to forbid a grantee from informing a pregnant woman of the availability of abortion and even from telling her where she can get abortion-related information. For example, though the regulations permit a grantee to give the woman a list of prenatal-care service providers that might also offer abortions, the list must comply with several requirements. It *must* include any available prenatal-care providers that *do not* perform abortions; it *cannot* include providers that offer abortions as their 'principal business'; and it cannot 'weigh[ ]' in favor of abortion providers. 42 C.F.R. § 59.8(a)(3). The grantee is not allowed to inform the

> woman which providers on the list, in addition to offering prenatal care, also perform abortions. Rather, care providers that also perform abortions may be included only if '*the referral* is *specifically* made to the providers of *prenatal* care services.' 53 Fed. Reg. 2922, 2938 (1988). Indeed, the grantee is required to inform the client about care to preserve the unborn fetus. Section 59.8(a)(2), for example, provides that 'once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services *by furnishing a list of available providers that promote the welfare of mother and unborn child.*'
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> . . . In addition to the regulations discussed above, for example, § 59.8(b)(4) provides that when a woman asks for a list of abortion providers, the grantee is not permitted to give her a list that includes entities whose principal business is abortion, or a list that does not include 'providers of prenatal care in the area which *do not* provide or refer for abortions.' In contrast, § 59.8(b)(5) provides that when a women asks for information on abortion, the grantee is permitted to 'tell[ ] her that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion'; it is permitted to 'tell[ ] the client that the project can help her to obtain prenatal care and necessary social services, and provide[ ] her with a list of such providers from which the client may choose.'
>
> Thus, the express prescriptions and proscriptions in the regulations require the grantee to emphasize prenatal care and prohibit it from identifying any entity as a provider of abortions. Plainly, the regulations facially discriminate on the basis of viewpoint and control the content of the grantee's permitted speech."

889 F.2d at 415-16 (emphasis in original).

If we could conclude that the pregnant women who are patients of Title X clinics are knowledgeable about their abortion option, or will seek advice from doctors not fettered by the Title X regulations, then we might conclude that *Maher* controls, because poverty alone does not give a woman the right to government-funded benefits. But it seems clear that government funding, which fuels virtually all "birth control" clinics in the nation, lures poverty-level women to these clinics for pregnancy testing, medical advice, and referrals to other health care providers. The promise of the clinics, and their goal under law, is to provide "comprehensive voluntary family planning services" upon request. H.R. Rep. No. 572, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068, 5075. Fees for the services are determined on a sliding scale, based on the woman's income. Absent a warning that the advice given at Title X clinics is incomplete, many patients no doubt will rely, without obtaining a second opinion, on the advice given them. At least many of the poorest, most naive and ignorant women—who are the persons targeted by Title X—will rely on that information.[2] Thus, by denying Title X providers the right to mention abortion, to refer to abortion as an option, or to provide professional referrals to others whom they know will counsel about all medical options that are legal, including abortion, the goverment has placed a state-created "obstacle in the path of a woman's exercise of her freedom of choice." *Harris*, 448 U.S. at 316.[3]

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2 Of course, the Secretary is in fact anticipating that women will rely on the information provided and will not therefore either need or desire abortions. *See* 42 C.F.R. § 59.2 ("[A]bortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion."); 42 C.F.R. § 59.8(b)(5) (example of pregnant woman who requests information on abortion providers and is given only prenatal care referrals). Information and referrals are an integral part of the services envisioned in the regulations. 53 Fed. Reg. 2923.

3 We will not assume, as the government apparently does, Appellant's Brief at 44 n.38, that the effect of the Title X provider's failure to mention abortion is mitigated or eliminated by a woman's access to abortion informa-

We must examine whether that obstacle, the government's provision of intentionally incomplete information, violates any constitutional right previously recognized by the Supreme Court. Of course, under current law a pregnant woman in the first stages of pregnancy has a federal constitutional right to an abortion. *Roe v. Wade*, 410 U.S. 113 (1973). Even if *Roe* is overruled, it means only that the existence of the right to an abortion is left to the political process, probably to the states. No doubt some states would continue to permit abortions, and a pregnant woman in a state forbidding abortions, by virtue of her right of travel to another state, in theory at least still would be able to secure a legal abortion. Thus abortion is currently a legally permissible option for a woman in the early stages of pregnancy, and it will likely remain so.

Because patients at a Title X clinic are invited to consult its physicians and are given intentionally incomplete medical advice, which they reasonably can be expected to follow, we think this case falls squarely within the prohibition in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron*

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tion from other sources. In fact, a provider's failure to mention abortion as a legal option, in the context of an otherwise neutral medical consultation, could well cause the woman to conclude that abortion is not a legal or medical option for her under the circumstances. Many states have recently undertaken measures to modify their abortion laws, which efforts receive extensive media attention. *See* "States Testing the Limits on Abortion," *N.Y. Times*, April 2, 1990, at A14, col. 4 (citing 100 then-pending abortion bills; fourteen floor votes on abortion bills since *Webster*). One reason women might seek information about their medical options at a family planning clinic is the confusion that arises from the barrage of bills introduced, passed, vetoed, or stayed by judicial action. *See, e.g., id.* (Guam, Pennsylvania, and South Carolina laws restricting access to abortion stayed in court actions; Idaho bill restricting abortion passed by legislature but vetoed by the governor); "Maryland Legislature Halts an Abortion Move," *id.*, March 24, 1990, at A7, col. 1 (Maryland legislature rejects public referendum to decide which of two conflicting abortion bills becomes law). The two decisions issued at the end of the most recent Supreme Court term, *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (upholding parental notification statutes), are unlikely to reduce the legislative activity or women's confusion about their medical options.

Center for Reproductive Health, Inc., 462 U.S. 416 (1983), against state intrusion into the advice a woman requests from or is given by her doctor. However *Webster*, *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), may have affected aspects of the *Thornburgh* and *Akron* decisions, we see nothing to diminish *Akron's* holding that

> "because abortion is a medical procedure, . . . the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.' The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing this decision should she choose abortion."

462 U.S. at 427 (citations omitted).[4] Stating that "it remains primarily the responsibility of the physician that appropriate information is conveyed to his patient," the Court struck down government-imposed abortion regulations "designed to influence the woman's informed choice between abortion or childbirth." *Id.* at 443-44. "The State's intent is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person." *Id.* at 448.

These principles were reaffirmed in *Thornburgh*, 476 U.S. at 760, 762. Indeed, *Thornburgh* condemned state rules that structured and slanted the dialogue between the physician and the pregnant patient in language that seems precisely applicable to the situation at bar:

> "Forcing the physician or counselor to present the materials [discouraging abortion] and the list [including agencies offering alternatives to abortion] to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician."

476 U.S. at 763 (citation omitted).

Again, we cannot improve upon the following statement in Judge Kearse's dissent in *New York* concerning the effect on the woman's constitutional rights:

> "The regulations at issue here prohibit the physician in a Title X facility from communicating to his patient frank and complete advice if it involves consideration of abortion. They require him, in referring his patient to other health-care providers, to identify only prenatal-care facilities. If his pregnant patient raises the subject of abortion, he is required to tell her that he cannot give her any advice or counseling on the subject. If she asks where she can get information, the regulations prohibit even an informative response.
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> . . .
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> Unlike the regulatory schemes in such cases as *Harris* . . . and *Maher* . . . in which the regulating authority was found merely to have refused to extend an affirmative benefit to women who freely chose abortion, but not to have placed obstacles in the way of an informed choice, the Secretary's regulations here plainly interfere with the pregnant woman's freedom to decide which course of action she prefers. In some cases, the information ban will delay the appropriate education of the patient to such an extent that she is denied any genuine choice. In some cases, the patient will never be fully informed, for as the Secretary has acknowledged, '[f]or many clients, family planning programs are their only continuing source of health information and medical

4 The Supreme Court's recent *Ohio* opinion, while approving a state requirement that a physician inform one parent when a minor patient is considering abortion, continues to recognize the importance of the advice of a detached physician with full information. *Ohio*, 110 S. Ct. at 2983.

care.' U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 9.4 (1981). These regulations prevent such a program from giving the client any substantive information regarding abortion as an option; if she asks where she may obtain such information, her Title X physician is prohibited from telling her.

By prohibiting the delivery of abortion information and prohibiting communication even as to where such information can be obtained, the present regulations deny a woman her constitutionally protected right to choose. She cannot make an informed choice between two options when she cannot obtain information as to one of them."

889 F.2d 416-17.

Although the matter has received little separate attention in court opinions to this point, the limitations placed on Title X physicians in communicating with their patients, and the referral obligations imposed upon them, violate the constitutional rights of the physicians themselves. The dearth of attention may be because the physicians' rights are considered derivative from the rights of the patient. *See Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977); *Harris*, 448 U.S. at 318 n.21. In the context of a right to advice in the confidential physician-patient relationship, physicians' rights would seem to be entirely coextensive with those of their patients, and if the patient's constitutional rights are violated so are the physician's. Nevertheless, a separate discussion of the physicians' position illuminates their predicament under the 1988 regulations and strengthens our belief that the new regulations must fail.

Physicians, of course, need not accept employment with grantees of Title X funds if they do not wish to abide by the limitations upon the advice they may give patients; presumably physicians already working for such organizations may quit if they do not like the regulations, although breaking contracts of employment might render them liable for damages. Even so, it is a well-established principle that, although the government has no responsibility to provide funds for a

program, it may not condition participation in a program it does fund upon a waiver of constitutional rights. This is set forth clearly in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), as follows:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."

This principle applies fully to employment situations. Individuals may not be required to abandon their constitutional rights to free speech or due process to obtain employment. *Id.* at 597.

The canons of ethics of the medical profession require physicians to give patients advice that includes abortion as an alternative to carrying a pregnancy to term when the patient's health condition warrants.[5] The health hazards of abortion in a particular instance may be less than the health hazards of carrying the pregnancy to term. One study comparing mortality statistics from abortion and childbirth concluded that "[i]n terms of dying, abortion through the 15th week of pregnancy is at least tenfold safer than childbearing." Cates,

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5 The American Medical Association Standards regarding informed consent state that physicians may refer patients to "any other provider of health care services permitted by law to furnish such services, whenever he believes that this may benefit the patient." *Current Opin. of Council on Ethical & Judicial Affairs of the American Medical Association—1986*, ¶ 304; *see also id.* ¶ 807 ("physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice"); American College of Obstetricians & Gynecologists (ACOG), *Standards for Obstetric-Gynecologic Services* 57 (1985) (in event of unwanted pregnancy the physician should counsel patient of abortion option); ACOG, *Statement of Policy: Further Ethical Considerations in Induced Abortion* (Dec. 1977) ("Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or the range of options to which the patient is entitled.").

Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth*, 248 *J. Am. Med.* A. 192, 196 (July 9, 1982).

The amended regulations, particularly 42 C.F.R. §§ 59.8-(a)(1) & (4) and 59.10(a), appear to prohibit physicians paid with Title X funds from advising women about the alternative of abortion even when carrying the baby to full term would involve grave risks for the mother. The regulations, particularly § 59.8(a)(2), appear to require Title X physicians to provide pregnant patients with literature from health care providers who will not perform abortions or counsel abortion as an option, and to forbid those physicians from referring pregnant patients to health care providers who will provide such services. In complying with the regulations, in theory at least, the physician risks censure and loss of his right to practice because of his failure to give impartial and full advice.

To condition receipt of Title X funds upon physicians' promises not to give advice that the standards of their profession require them to give implicates the physicians' First and Fifth Amendment rights. *See, e.g., Thornburgh*, 476 U.S. at 763; *Akron*, 462 U.S. at 445; *Frieman v. Ashcroft*, 584 F.2d 247, 251-52 (8th Cir. 1978); *aff'd men..*, 440 U.S. 941 (1979). This conclusion also does not depend on the continued efficacy of *Roe v. Wade* because, for the reasons already stated, for most women abortion would continue to be a legal alternative that physicians must be free to discuss with their patients.

For the reasons stated, we hold that the regulations violate the Title X providers' and the women patients' First and Fifth Amendment rights. We AFFIRM the permanent injunction issued against the implementation of the challenged amendments to the regulations.

BALDOCK, Circuit Judge, dissenting in part.

With the apparent exception of the separation requirements contained in 42 C.F.R. § 59.9,[1] the court today holds unconstitutional the 1988 amendments to the HHS regulations, 42 C.F.R. §§ 59.1-59.17, designed to implement the purpose of Section 1008 of Title X of the Public Health Services Act, 42 U.S.C. § 300a-6. According to the court, the limitations placed upon Title X recipients by the regulations, namely § 59.8, facially violate a pregnant woman's fifth amendment right to choose abortion and her physician's first amendment right to speak frankly about abortion. Because Supreme Court precedent dictates a contrary result, I dissent.

1 In part II of its opinion, the court holds § 59.9 invalid as contrary to Congressional intent. Court's Opinion at 12-13. I agree. The aim of Title X is to increase and improve family planning services to indigents in cooperation with existing state and private programs. In enacting Title X, Congress did not intend "to restrict the types of projects with which a Title X recipient could associate, or to place limitations on the physical proximity or the sharing of personnel between Title X projects and unrelated programs which may provide abortion services." *Commonwealth of Mass. v. Bowen*, 679 F. Supp. 137, 143 (D. Mass. 1988), *aff'd*, 899 F.2d 53 (1st Cir. 1990), *cert. pending*, No. 89-1929 (June 8, 1990). Because I concur fully in the court's statutory resolution of the challenged regulations, neither I nor the court have occasion to address § 59.9's constitutionality. *See Harris v. McRae*, 448 U.S. 297, 306-07 (1980) (where case may be decided on either statutory or constitutional basis, court should decide case on statutory basis and avoid constitutional adjudication). Since the court, however, assumes the severability of § 59.9 from the remaining regulations, the constitutionality of those regulations is at issue. *See Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (statutory severability).

I.

The court reasons that *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), control the outcome of this case. Court's Opinion at 20. In those cases, however, the Supreme Court struck down "informed consent" laws that required *all* doctors within their respective jurisdictions to provide *all* pregnant patients contemplating abortion with a litany of information, regardless of whether the patient sought the information or her doctor thought the information necessary to the patient's decision to abort. *Thornburgh* and *Akron* had nothing to do with a governmental decision to encourage

childbirth and discourage abortion through the funding of services relating to the former and not the latter.

The possibility that the HHS regulations will discourage some women from having an abortion is hardly sufficient to invalidate those regulations on their face.[2] *See Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting). *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), all support the view that the allocation of government monies to encourage childbirth over abortion does not unduly burden a woman's right to seek an abortion or place a governmental obstacle in the path of a woman's choosing to have an abortion. Yet this court rejects this line of decisions as bearing only a "superficial resemblance" to the instant case. Court's Opinion at 14.

Roe v. Wade, 410 U.S. 113 (1973), imposes "*no* limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474 (emphasis added). Section 59.8's restrictions on abortion counseling and referrals for Title X recipients leaves a pregnant woman with essentially the same choice as if the government had chosen not to provide Title X grants at all. Admittedly, this analysis might differ if the government had socialized medicine, *see Webster*, 109 S. Ct. at 3052 n.8, but the government has not. At this point, the regulations interfere with a woman's ability to obtain an abortion only if she seeks an abortion with the assistance of Title X funds. *See id.* at 3052. The inability of an indigent woman to obtain an abortion would be no less in the absence of Title X. *See Harris*, 448 U.S. at 316. Accordingly, the HHS regulations do not infringe upon a woman's right to abortion.

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2 A facial challenge to the regulations is a most difficult challenge since the challenger must establish that the regulations would be invalid under all circumstances. That the regulations might operate unconstitutionally under some scenario is insufficient to render the regulations invalid on their face. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3060 (1990) (O'Connor, J., concurring).

II.

The regulations, however, undoubtedly infringe upon the doctor-patient relationship by limiting the free flow of information from the doctor to the patient regarding abortion services. As Judge Cardamone stated: "[A] Title X physician's hands are tied with respect to the response he or she may give to a patient seeking abortion information. . . . [The regulations] constitute[ ] a trap for the mostly unsophisticated and unwary patients, and jeopardizes the ability of Title X physicians to safeguard the health of those people seeking their expert advice." *State of New York v. Sullivan*, 889 F.2d 401, 415 (2d Cir. 1989) (Cardomone, J., concurring), *cert. granted*, 110 S. Ct. 2559 (1990).

A physician certainly has a common law duty to discuss matters openly and frankly with the patient. *See Smith v. Cote*, 513 A.2d 341, 355 (N.H. 1986) (Souter, J., concurring) (physician's timely disclosure of professional limits based on moral scruples combined with timely referral to physician not so constrained may be sufficient defense in action for failure to advise). Yet the Constitution provides little protection for the "dialogue" a physician undertakes in the course of treating a patient. *Thornburgh*, 476 U.S. at 802 (White, J., dissenting). Regulation of the professions is a matter within the competence of lawmakers, not federal courts. *Id.* at 802-803 (Constitution is "largely unconcerned" with substantive aspect of professional regulation). Because the HHS regulations are rationally related to the governmental interest in "protecting potential life," they in no way infringe upon a physician's constitutional rights. *See Akron*, 462 U.S. at 466 (O'Connor, J., dissenting).

The first amendment does not require the government to subsidize the spread of information which as a matter of public policy the government finds repugnant. *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983). *Perry v. Sinderman*, 408 U.S. 593 (1972), cited by the court to support its holding that the regulations violate a physician's first amendment rights, is not to the contrary. Court's Opinion at 23. In *Perry*, a state supported employer refused to extend

the contract of its employee because the employee had exercised his first amendment rights outside the scope of his employment. Nothing in Title X prohibits recipients from saying about abortion whatever they desire outside of Title X services. *State of New York*, 889 F.2d at 412-13. Moreover, in *Perry*, the employer's purpose in suppressing the speech was *not* to avoid subsidizing the speech, but rather to punish the employee for political activity. *See FCC v. League of Woman Voters*, 468 U.S. 402, 408 (1984) (Rehnquist, J., dissenting).[3] Unlike this case, the state action in *Perry* was unrelated to any legitimate governmental objective. Through the HHS regulations, the government in this instance merely has chosen to encourage childbirth rather than abortion. That policy choice in no way contravenes the constitution.[4]

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3 In *League of Women Voters*, the Court by a five to four vote held unconstitutional a congressional ban on editorializing by noncommercial educational television and radio stations where federal funding constituted only 1% of the stations' overall income. In contrast, federal funds account for 50% of the monies received by Title X recipients. Court's Opinion at 12.

4 In *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) and *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947), the Supreme Court rejected the notion that Section 12(a) of the Hatch Act was unconstitutional because of its interference with an employee's freedom of expression in political matters. In his dissent in *League of Women Voters*, Justice Rehnquist cogently noted:

> Section 12(a) of the Hatch Act totally prohibits any local or state employee who is employed in any activity which receives partial or total financing from the United States from taking part in any political activity. One might just as readily denounce such congressional action as prohibiting employees of a state or government receiving even a minor fraction of that government's income from federal assistance from exercising their First Amendment right to speak.

468 U.S. at 406 (Rehnquist, J., dissenting). Of course, political association constitutes the "core of those activities protected by the first amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). But the first amendment does not prohibit government from regulating the public political activity of those even partially dependent on its monetary benefits. How then, can the first amendment be read to prohibit a restriction on the dialogue between a physician and patient, when the physician and patient rely on federal funding to carry on such dialogue?

EXHIBIT B

Sixteen states and the District of Columbia have recognized a cause of action for wrongful birth arising from a woman's allegation that she was precluded from making an informed decision whether to have an abortion because her physician failed to adequately notify her while she was pregnant that her child could be born with birth defects.

Alabama:	*Robak v. United States*, 658 F.2d 471, 474-76 (7th Cir. 1981).
California:	*Turpin v. Sortini*, 31 Cal. 3d 220, 225, 237-38, 643 P.2d 954, 957, 965 (1982) (*en banc*).
Colorado:	*Lininger v. Eisenbaum*, 764 P.2d 1202, 1204-08 (Colo. 1988) (*en banc*).
District of Columbia:	*Haymon v. Wilkerson*, 535 A.2d 880, 882-86 (D.C. 1987).
Florida:	*Moores v. Lucas*, 405 So. 2d 1022, 1026-27 (Fla. 5th Dist. Ct. App. 1981).
Illinois:	*Siemienic v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 253-60, 512 N.E.2d 691, 703-06 (1987).
Maine:	Me. Rev. Stat. Ann. tit. 24, § 2931(3) (1990).
Michigan:	*Proffitt v. Bartolo*, 162 Mich. App. 35, 41-47, 412 N.W.2d 232, 235-38 (1987), *appeal denied*, 430 Mich. 860 (1988).
New Hampshire:	*Smith v. Cote*, 128 N.H. 231, 237-42, 513 A.2d 341, 344-48 (1986).

New Jersey:	*Berman v. Allen*, 80 N.J. 421, 430-32, 404 A.2d 8, 13-14 (1979), *overruled on other grounds*, *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984).
New York:	*Becker v. Schwartz*, 46 N.Y.2d 401, 412-15, 386 N.E.2d 807, 813-14, 413 N.Y.S.2d 895, 901-03 (1978).
South Carolina:	*Phillips v. United States*, 508 F. Supp. 544, 548-51 (D.S.C. 1981).
Texas:	*Jacobs v. Theimer*, 519 S.W.2d 846, 848-50 (Tex. 1975).
Virginia:	*Naccash v. Burger*, 223 Va. 406, 411-15, 290 S.E.2d 825, 828-30 (1982).
Washington:	*Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 465-76, 656 P.2d 483, 487-93 (1983) (*en banc*).
West Virginia:	*James G. v. Caserta*, 332 S.E. 2d 872, 881-83 (W.Va. 1985).
Wisconsin:	*Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 773-75, 233 N.W.2d 372, 376-77 (1975).